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No. 82-783

In the Supreme Court of the United States

OCTOBER TERM, 1982

STANLEY M. DIEFENTHAL AND ELKA F. DIEFENTHAL,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD AND EASTERN AIRLINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-32) is reported at 681 F.2d 1039. The opinion of the Civil Aeronautics Board and the judgments of the United States District Court for the Eastern District of Louisiana (Pet. App. A-33, A-34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1982. The petition for a writ of certiorari was filed on November 4, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions, Sections 204(a), 401(e)(4), and 404 of the Federal Aviation Act of 1958 (the Act), 49 U.S.C. (& Supp. IV) 1324(a), 1371(e)(4), and 1374, and the Civil Aeronautics Board's smoking regulations, 14 C.F.R. Part 252, are reproduced at Pet. App. A-35 to A-38.

STATEMENT

This case presents a challenge to the Civil Aeronautics Board's authority to regulate smoking aboard aircraft. The Board's regulations, which were originally adopted in 1973, require that carriers provide, for each class of service, a nonsmoking section large enough to accommodate all those who request such a seat (14 C.F.R. 252.2). The regulations also permit carriers to restrict smoking more stringently or to ban it altogether if they wish (14 C.F.R. 252.1). These regulations were issued pursuant to Sections 204(a) and 404(a) of the Act, 49 U.S.C. 1324(a) and 1374(a). Section 404(a) requires, among other things, that carriers provide "adequate service" and "establish, observe, and enforce * * * just and reasonable classifications, rules, regulations, and practices." Section 204(a) empowers the Board to promulgate regulations "pursuant to and consistent with the provisions of the [the Federal Aviation Act], as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under [the Act]."

Petitioners are two airline passengers who were not assigned smoking seats, contrary to their requests, on an Eastern Airlines flight from New Orleans to Philadelphia in 1978 (Pet. App. A-3). As the court of appeals observed, that "relatively trivial incident" led to "a spate of litigation" (*ibid.*). Petitioners sued the airline in the United States District Court for the Eastern District of Louisiana for tort and breach of contract and also sought an injunction against enforcement of the regulations on the ground that

they were invalid (*ibid.*).[1] In addition, they petitioned the Civil Aeronautics Board to revoke its smoking regulations. The district court dismissed the suit against the airline (*id.* at A-34), and the CAB denied the petition to revoke its regulations (Order 80-8-80, August 14, 1980). The United States Court of Appeals for the Fifth Circuit affirmed both decisions.

In challenging the Board's smoking regulations, petitioners asserted only that the Board lacked statutory authority to adopt them. Petitioners did not challenge the reasonableness of the rules (see Pet. App. A-7 to A-8). Petitioners contended that Section 404(a)'s "adequate service" requirement was not intended to permit the CAB to regulate the quality of traveling conditions for airline passengers but was intended only to regulate the number of flights provided in a market (see *id.* at A-9 to A-10).

The court of appeals rejected petitioners' arguments, finding (*id.* at A-9) that "the division of the interior of an airplane into smoking and nonsmoking areas * * * appears to be reasonably related to the purpose of the Act." The court also found (*id.* at A-7, A-11 to A-14) that the Board's interpretation of the Act was consistent with the legislative history and with judicial construction of analogous statutory language under which the Interstate Commerce Commission regulates smoking on interstate buses. Finally, the court concluded (*id.* at A-17 to A-19) that changes in congressional policy embodied in the Airline Deregulation Act

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[1]The suit against Eastern Airlines originally named the CAB as a co-defendent, but the claims against the CAB were dismissed by the district court for lack of subject-matter jurisdiction (Pet. App. A-33). Petitioners did not challenge that ruling on appeal, and the court of appeals did not reach that issue (see Pet. App. 7a n.4).

of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.*, did not prevent the CAB from continuing to regulate smoking.[2]

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. The Civil Aeronautics Board has consistently construed the "adequate service" and "just and reasonable practices" provisions of Section 404(a) of the Act, 49 U.S.C. (Supp. IV) 1374(a), combined with the Board's broad rulemaking powers under Section 204(a), 49 U.S.C. 1324(a), as conferring the authority to regulate smoking on airplanes subject to its jurisdiction. This case thus presents a challenge to the Board's interpretation of the statute that the Board implements. As this Court has stated, an agency's interpretation of the statute it administers is entitled to deference. In reviewing such an interpretation, a court is "not to interpret the statute as it [thinks] best" but rather must limit its inquiry to "whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court * * *. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). Accord, *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 83 (1980). The Board's long-standing interpretation of the provisions at issue here is more than "sufficiently reasonable" to withstand such review.

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[2]The court based its decision entirely on the "adequate service" provision in Section 404(a), finding that provision "sufficient by itself to support the regulations" (Pet. App. A-9 n.5). Thus, it did not consider whether the "just and reasonable practices" requirement of Section 404(a) provided independent authority for the regulations.

Section 404(a), 49 U.S.C. (Supp. IV) 1374(a), requires each certificated carrier to provide "adequate service." As the court of appeals held (Pet. App. A-9), "[o]n its face, this language supports the CAB's regulation" since "the division of the interior of an airplane into smoking and nonsmoking areas is one component of the service to be provided by a carrier." Petitioners argue (Pet. 7) that the Board previously interpreted "adequate service" as referring only to airline schedules. But as the court of appeals correctly observed (*id.* at A-10), while "the CAB has found that the number of flights scheduled is a component of adequate service, that interpretation does not preclude the phrase from also referring to the quality of service provided."

The court of appeals' decision is consistent with other judicial interpretations of Section 404(a) and similar statutes. In *Capital Airlines* v. *CAB*, 281 F.2d 48 (D.C. Cir. 1960), the court upheld a Board order requiring a carrier to add coach service to its first-class service in certain markets. The precise statutory phrase at issue in this case — "adequate service" — has also been found sufficient to empower the ICC to regulate smoking on interstate buses (*National Association of Motor Bus Owners* v. *United States*, 370 F.Supp. 408 (D.D.C., 1974) (three judge court)). In addition, in *Crescent Express Lines* v. *United States*, 49 F.Supp. 92, 94-95 (S.D.N.Y.) (three judge court), aff'd, 320 U.S. 401 (1943), the court upheld ICC regulation of the type of passenger sedan service a motor carrier could provide. As the court of appeals concluded (Pet. App. A-11), "[t]hese opinions make clear that the 'service' which a carrier is required to provide is not limited to the number of flights scheduled."

Section 204(a) of the Act, 49 U.S.C. 1324(a), grants the Board broad power to issue rules "deem[ed] necessary to carry out the provisions, of and to exercise and perform its powers and duties under [the Act]." That provision confers ample authority for the promulgation of the regulations in

question here. "Even the absence of an express delegation of power to regulate a particular area is not fatal to the validity of a regulation so long as the regulation reasonably advances the purposes of the enabling statute" (Pet. App. A-8; see also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973); *American Trucking Association* v. *United States*, 344 U.S. 298 (1953). The smoking regulations satisfy this standard because they serve the Board's broad mandate to encourage the development of air transportation and to promote "adequate" and "efficient" service (49 U.S.C. (& Supp. IV) 1302(a) and (c)).

The Board's interpretation is also consistent with the statute's legislative history. Sections 204(a) and 404(a) were originally enacted as part of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 983, 993. As the court of appeals explained (Pet. App. A-12 to A-14), the "primary source" of legislative history for the "adequate service" provision is the 1935 report of the Federal Aviation Commission (S. Doc. No. 15, 75th Cong. 1st Sess. (1935)), whose recommendations Congress adopted "almost verbatim." That report recommended (*id.* at 7) that air carrier certificates should "specify a minimum quality of service and a minimum frequency of schedule on airlines." Thus, the Commission "envisioned that the new agency would specify the minimum quality of service and that competition would motivate the airlines to go beyond that minimum" (Pet. App. A-14).

The Board's authority to regulate smoking was not undermined by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* While that Act reduced the Board's regulatory powers in other areas, Congress specifically retained the portion of Section 404(a)(2)(B) requiring air carriers to provide safe and adequate service (49 U.S.C. (Supp. IV) 1551(a)(2)(B)). Moreover, Congress did not find fault with "the CAB's regulation of the quality of service or, specifically, its well-known regulation of smoking" (Pet. App. A-18).

Petitioners have offered virtually nothing to rebut the weight of judicial precedent and legislative history cited by the court of appeals. In support of their assertion that the "adequate service" requirement has "consistently" been read as applying only to airline schedules, they cite (Pet. 7) a single Board order, Order 78-14-121, at 50. However, that order does not purport to set forth any overall interpretation of Section 404(a) and was issued by the Board after the smoking regulations had been in effect for five years. Petitioners err as well in construing Section 401(e)(4) of the Act, 49 U.S.C. (& Supp. IV) 1371(e)(4), as a prohibition against Board regulation of smoking (see Pet. 6). That Section, which provides that CAB certificates may not "restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require," does not prohibit the CAB from setting minimum standards of service under Section 404(a). As the court of appeals held (Pet. App. A-16 to A-17), "the section does no more than recognize that an airline need not submit for agency approval every addition to or change in its service, consistent with that already certified, to the CAB for approval." See also *Capital Airlines* v. *CAB, supra*, 281 F. 2d at 52 (Section 401(e)(4) does not limit Board's power to enforce adequacy of service requirement).

Finally, petitioners assert (Pet. 8) that smoking regulations constitute unjust discrimination in violation of Section 404(b) of the Act, 49 U.S.C. 1374(b), because "[n]onsmokers are guaranteed seats in non-smoking sections, but smokers cannot be assured of seats in smoking sections." However, "every difference in treatment by an airline does not constitute discrimination" (Pet. App. A-26). See *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir.

1975) (Pet. A-26).[3] The CAB's smoking regulations reflect a reasonable balance between the rights of smokers and non-smokers and do not constitute unjust discrimination. In any event, this issue does not warrant this Court's review because the statutory prohibition against unjust discrimination in interstate air transportation will terminate at the end of 1982. See 49 U.S.C. (Supp. IV) 1551(a)(2)(B).

CONCLUSION

The petition for writ of certiorari should be denied.

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[3]The court discussed the unjust discrimination issue solely with respect to petitioners' claim to a private right of action and not with respect to the Board's authority for adopting the smoking regulations, since petitioners never raised that issue before the Board (Pet. App. 7a n.4).

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